IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,
Appellants,

vs.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,
Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF FOR THE APPELLEES.

JOHN H. LARSON,
County Counsel,
JAMES DEXTER CLARK,
Deputy County Counsel,
648 Hall of Administration,
Los Angeles, Calif. 90012,
(213) 974-1833,
Counsel for Appellees.

Staff Assistants:
MARY MAYER,
GREASON HAWORTH,
LAWRENCE S. RUBINSON,
LINDA VAN WINKLE.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Page

Page

Miscellaneous

Regulations

Statutes

Textbooks

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

vs.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF FOR THE APPELLEES.

The Question of Jurisdiction.

The Appellants and the United States have placed the Appellees in an awkward position. The Appellees firmly believe that a nondiscriminatory fairly apportioned ad valorem tax on this property, like all other property in the taxing jurisdiction, is valid, and that the Appellants are not in a privileged position because they use containers rather than conventional means or because they have their corporate offices in another country. At the same time the Appellants have injected the issue of the relationship between the tax and governmental services, and the United States depends for all

of its arguments on the Container Convention (20 UST 301). Neither of these matters were brought before California's Appellate Courts. In support of these matters both the Appellants and the United States seek to introduce new "facts".

The Appellees have dealt with the theories and the "facts" presented as they reflect upon the merits of this case. They believe that both the Appellants and the United States are presenting factual and legal conclusions which are incorrect.

This Court has held that considering issues in this manner is incorrect and that new facts are improperly brought up at this time (*Beck v. Washington,* 369 U.S. 541 (1962); *Cardinale v. Louisiana,* 394 U.S. 437 (1969)). The Appellants' response to such arguments is simply to present more facts.

The Appellees urge this Court to dismiss the Appeal.

The details of the factual and legal assumptions made by the Appellants and their supporting *amici curiae* are set forth in sections of this brief dealing with the Appellants' Assumptions and the Facts.

Summary of Argument.

The Appellants and their supporting *amici curiae* have assumed that a property tax is both a regulation and a user fee. They have also assumed that the federal government has authority to change a nondiscriminatory state tax into a federal regulation by giving an exemption solely on the basis of the origin of the property. They believe that public health, flood control and school functions have nothing to do with their ability to bring their property into the taxing jurisdiction and to safely use it there to make a profit.

They believe that their ability to so use their property has nothing to do with its value. Factually, the Appellants assume that part of a budget is all of it and that city budgets are not to be considered at all. All of these assumptions are utilized to support a panoply of constitutional positions, but all of them are incorrect.

As to the arguments concerning both interstate and foreign commerce: (1) The Tonnage Clause does not prohibit an ad valorem property tax (*State Tonnage Cases,* 79 U.S. 204 (1871)); (2) A fee test is not applicable to ad valorem property taxes (*Illinois Central R.R. Co. v. Decatur,* 147 U.S. 190 (1893)), even if used to test a privilege tax. Even if it were, the general services of the localities provide a healthy, educated workforce on which the Appellants rely in doing business. Without those services, the Appellants would have to provide more training (or indirectly pay for more training conducted by the companies moving its containers), health activities, fire protection and road construction. Even though the localities' benefits to the Appellants may not all be of a "direct" variety, they nevertheless increase their ability to move their containers and reduce their costs. They are, therefore, subject to a general tax in proportion to value (*The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus,* 154 U.S. 439, 445-6 (1894)); (3) The due process clause does not prohibit a tax if nondiscriminatory and related to the taxpayer's activity in the state (*Moorman Manufacturing Co. v. Bair,* .... U.S. ...., 98 S.Ct. 2340 (1978).

As to the preference over United States' nationals sought by the Appellants specifically because of their foreign home office:

(1) The general rule is that carriers in both interstate and foreign commerce are subject to property taxes (*Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 23 (1891); *Maine v. Grand Trunk Ry. Co. of Canada*, 142 U.S. 217 (1891)).

(2) The Appellants and their supporting *amici curiae* use cases involving no continuous presence of property as if specifically exempting property in foreign commerce. They further rely on the idea that federal regulation, specifically the tariff system, cannot work unless the states lay no general taxes which increase the cost of foreign goods. Such logic has been rejected by this Court (*Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Department of Revenue v. Assoc. of Washington Stevedoring Cos.*, ... U.S. ...., 98 S.Ct. 1388 (1978)). They also assume that the federal government has the right to carve out exemptions in state taxes in order to make its regulations. But it has long been held that the federal government may not prohibit nonregulatory state taxation which is constitutionally valid (Fed. Papers No. 32; *Lane Co. v. Oregon*, 74 U.S. 71, 76-78 (1869); *Gibbons v. Ogden*, 22 U.S. 1, 199-200 (1824); *Union Pacific v. Peniston*, 85 U.S. 5, 30 (1873); *Low v. Austin*, 80 U.S. 29, 34-35 (1872)).

(3) Contrary to Appellants' contention there is no "custom of international law" requiring the use of a home port concept which will allow a port to tax property even though it may never come within its jurisdiction. (See *Southern Pacific v. Kentucky*, 222 U.S. 63 (1911).) Thus, the Appellants argue that a taxing jurisdiction must give benefits in order to tax but seek to prohibit the method most likely to being that result to pass. They argue that it is well

settled that foreigners have preference over nationals, but cite no authority. International law experts have called such thinking an "insult" to nationals of a country (Roth, "International Law Applied to Aliens" (1949) pp. 62-65).

(4) Treaties themselves cannot expand federal power (*Holden v. Joy*, 84 U.S. 211, 242-3 (1872); *Holmes v. Jennison*, 39 U.S. 540, 569 (1840)). The fact that the Customs Bureau does not impose duties on the containers does not sanctify them, nor was it ever intended to do so. *McGoldrick v. Gulf Oil Co.*, 309 U.S. 414 (1940) never considered the power of the federal government in this area and dealt with a different test (even before *Youngstown Sheet & Tube Co. v. Bowers*, ... U.S. .... (1959)) of immunity from state taxation. *Michelin v. Wages*, *supra*, makes that test no longer appropriate. None of the treaties or international agreements provide aid to the Appellants and most prescribe "national treatment" as proper in the area of state and local taxation.

As to the Appellants' threat of "double taxation": It is no less because of the use of the "home port" doctrine. Many countries will continue to tax containers within their borders over 30 days or more. The only difference between the two alternatives offered this Court is that the apportionment method (used for other taxes) will achieve a relationship to the governmental benefits and will treat all businesses which are active in this country in the same way.

ARGUMENT.

PRELIMINARY CONSIDERATIONS.

This case involves the taxability of cargo shipping containers which are located in the taxing jurisdiction and which the Appellants use to carry goods to and from foreign countries.

The general rule in this country is, that although other taxes may not be validly imposed by the states:

> "We may here repeat, what we have so often said before, that this exemption [from a full license tax] of interstate and foreign commerce from state regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed . . . ." (*Leloup v. Port of Mobile,* 127 U.S. 640 at pp. 648-649 (1888).)

The tax in this case is one imposed on all property located within the State of California (Cal. Const. Art. XIII, Sec. 1).

The Appellants urge several grounds for its non-applicability to them.

A. The Appellants' Basic Assumptions.

All of the Appellants' arguments (as well as those of the United States in contending that its departments may convert a nondiscriminatory state tax into a federal regulation), are based upon certain factual and legal assumptions. Those assumptions have no support in law or logic.

The factual assumptions are dealt with in the section of this brief dealing with the facts on the record as well as those which are not.

The Appellants' first assumption is that the provision of general services by the States in order to assure economic and social stability does not benefit carriers doing business therein. Therefore, conclude the Appellants, the property tax on cargo containers is not valid under a variety of legal principles. The assumption is unwarranted. Schools educate the Appellants' repairmen, as well as the operators of the cranes, trucks, and trains (and the police and fire forces) upon which they rely in moving their containers. They are trained in basic mechanical and communications skills by the state and the districts; they are kept free from disruptive epidemic by the public health efforts of local and state government; flood control districts prevent potential disaster to the containers and the routes they travel; water is supplied to industrial areas, including the Appellants', both for the workers and the machinery that repairs and moves the containers. It is true that some of these activities benefit the workers and the companies rendering services to the Appellants. But the Appellants share in the benefits as well. A worker may directly benefit from the fact that the mosquito abatement district has prevented a malaria epidemic. But the Appellants may well depend upon that worker's presence to move or repair its containers. All of the services supported by a general tax benefit the ability of the Appellants to enter California and make money there. That is why general taxes, even those imposed upon nonresidents, have not been tested by measuring how specific that benefit is. (See *Illinois Central R.R. Co. v. Decatur,* 147 U.S. 190 (1893); *Thomas v. Gay,* 169 U.S. 264 (1897)).

The Appellants' second assumption is that a general tax is the same as a privilege tax or a user fee.

The Appellants first assert that *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977) provides the tests for any tax. It next asserts that the "reasonable relationship between tax and benefit" test must be applied to a tax as if to a user fee. But the property tax is not a user fee, and has not been tested against a "fee" rationale. The regular and constant presence of the property in the taxing jurisdiction, unchanging and increasing as it is, provides assurance that the services of state and local governments (limited as they are to benefiting the public at large: *Citizens Savings & Loan v. Topeka,* 87 U.S. 655 (1873)) will aid the owner in doing business, whether the business is foreign or domestic (*Pullman's Palace Car Co. v. Pennsylvania, supra* at p. 26).

The third assumption is that a tax is the same thing as a regulation. Numerous cases are cited as prohibiting the States from regulating. But they are not applicable unless the tax is imposed unevenly or on property not located in the jurisdiction (*Michelin Tire Corp. v. Wages, supra* at p. 286).

> "There is no analogy, then, between the power of taxation and the power of regulating commerce." (*Gibbons v. Ogden,* 22 U.S. 1 (1824) at pp. 199-200).

The fourth assumption is that the federal government in general and a federal executive department in particular, may convert a nondiscriminatory state tax into a discriminatory regulation, benefiting one class of business simply because it has its principal place of business

in another country. This assumption is grounded upon the Appellants' and the United States' view that the federal government can prohibit and regulate any state tax, even those which are nondiscriminatory revenue measures. This assumption is simply not correct (*Union Pacific v. Peniston,* 85 U.S. 5 (1873) at p. 30; *Lane Co. v. Oregon,* 74 U.S. 71 (1869) at pp. 76-78; *Low v. Austin,* 80 U.S. 29 (1872) at pp. 34-35; Fed. Papers No. 32) (see Clark, *Property Taxation of Foreign Goods and Enterprises,* 4 Pepperdine Law Review 39).

Although the issue was taken up at a time when the home port doctrine was the rule of situs, this Court explicitly stated

> "that the right of the States to tax was not impaired by any affirmative grant of power to the General Government . . . ." (*The Wheeling, Parkersberg & Cincinnati Transportation Co. v. Wheeling,* 99 U.S. 273 at p. 280).

Finally, the Appellants assume that State and local services are in no way related to the value of the property and object to the decreasing amount of taxed value as the containers age. But the value of the containers is their value to generate income. To the extent that the containers fail to generate income they become valueless to the Appellants, or any similar enterprise. This is borne out by the fact that insurance policies on property compensate the owner for loss in terms of the value of the property lost. If a flood causes the loss of a container, it will fail to generate

income. Of course, the older the container is, the shorter economic life it has and the less future income it will generate. Its value, logically, is lower, and its loss through fire or flood will be less serious as its age approaches the normal time for its replacement.[1] The benefits to the taxpayer are, thus, related to the value of the property to him.

THE FACTS.

A. The Facts Which Are on the Record.

Both the Appellants and the Appellees agreed to a statement of the facts. They agreed that that statement should be utilized by the appellate courts in their review of this case. That statement is now part of the record (App. pp. 27, *et seq.*). The facts as agreed by all of the parties show that a uniform number of cargo shipping containers is utilized by the Appellants in the taxing jurisdiction throughout the year (App. p. 33). It also shows that the individual containers were in the jurisdiction an average of three weeks, but always less than six months, and were in transit except for the time awaiting loading and awaiting repairs in the taxing jurisdiction (App. p. 31). The cargo shipping containers may be used on ships, trains, or trucks in order to transport cargo (App. pp. 31-32). A general outline of the movement of the containers when they leave the harbor area by means of truck or rail is set forth (App. pp. 31-32). Although it is not specified whether the contain-

[1]Appellants had an opportunity to contest the value placed upon the property by filing for value reduction before the local Assessment Appeals Board, but their complaint shows only that they brought this action to contest the purely legal questions (App. pp. 3-20).

ers were taxed in Japan on an apportioned basis or full basis, they were taxed there, while American containers were not (App. p. 32).[2]

B. The Facts Which Are Not on the Record.

The Appellants have attempted to introduce more "facts" in an effort to defeat the tax. These "facts" were not addressed at *any* time before the Jurisdictional Statement. Other "facts" were not referred to until the Appellants' Brief.[3]

The Appellants contend that the combined expenditures for some police and fire protection and roads ($196,255,471.00 for 1972-73) are not enough, because personal property taxes amounted to $98,248,582.00. This reasoning is supported by some calculations which have no meaning. They are further described in the Appellees' Motion to Dismiss or Affirm.[4]

In an effort to provide more information, they recite a paragraph of facts in their brief which facts are simply unsupported (see p. 8, par. 3). They assert, first, that the Port of Long Beach maintains a security

[2]The "Guide to Japanese Taxes 1975-1976" (by Taizo, Hayashi, published by Zaikei Shoho Sha (Tokyo)) does not state that personal property taxes are imposed, even though it refers to real property taxes. Apparently, Japan has discontinued the practice of taxing its own containers on any basis. The Multi-State Tax Commission's brief takes up this question.

[3]The Appellants had ample opportunity to open up new areas. In fact, the California Court of Appeals accepted a totally new argument at oral argument, and the present attorneys brought up other new facts in their Petition for Rehearing to the California Supreme Court.

[4]The Appellants had an opportunity to respond, both in their Reply to the Motion and in their Brief. They have not done so.

force and some fireboats.[5] Next, they introduce a financial statement for years not covered by these taxes for the Port of Los Angeles (A.B. pp. 12a-13a). The financial statement shows no expenditures for fire or police protection, but do show, the Appellants point out, that for those years the Port of Los Angeles was operating at a profit. They do update this material by showing essentially the same thing for the first year covered by the taxes in question (A.B. p. 14a).[6] Finally, the Appellants point out that with regard to one of the bills for one of the years in question, taxes were levied by the City of Los Angeles, the County, the school districts of the area, flood control district, water replenishment district and agencies, and the mosquito abatement districts (A.B. p. 11a).

From the "evidence," the Appellants assume, (1) that only direct fire and police protection (*i.e.*, not including buildings, central administration, etc.) are fairly related to the tax; (2) that no services are provided by the City of Los Angeles or the City of Long Beach; (3) that no state funds are used to support those services; and (4) that the County spends 2% of its budget on services related to property.

The conclusions are not even justifiable from the "facts," and the "facts" are incomplete and unsupported.[7]

[5]Both City Appellees provide police and fire protection to all land areas of the harbors, as well as to all the territory in their jurisdictions.

[6]The lien date (as Appellants point out) falls in the March before the actual tax year in question.

[7]The Appellants invite this Court to remand this matter if the court finds it cannot take cognizance of the facts (see p. 42 fn. 10 of Appellants' brief). A remand of this matter

Perhaps the appellants' first "assumption," *i.e.*, that only police, fire, and roads relate to property, is the most unsupported and illogical. The assumption would mean, for instance, that, even though malaria prevention provides a healthier work force with less disruption of commercial traffic, the prevention of malaria does not help the property which Appellants use to make a profit. The schools provide employees who are educated and skilled in operating the heavy equipment which removes the containers from the ships, thus eliminating the need for more expensive manual labor.[8] Other skilled personnel repair the Appellants' containers and still others drive the trucks and trains which carry the containers to their destination, both in and out of the taxing jurisdiction.[9] None of these concepts are dealt with by the Appellants. They simply ask this Court to assume that there is *no* relationship between public health or public education and the enterprise being operated by them.

is totally unjustified. The Appellants have had a substantial amount of time to apprise the courts of facts which are more favorable than those stipulated. They have not even shown city expenditures, tax bills for all Appellants, or a complete picture of the County's expenditures. Many of these defects were pointed out to the Appellants in the Motion to Dismiss or Affirm. That they have not responded indicates their willingness to proceed on the basis of the record before the Court.

[8]It should be noted that public schools and technical junior colleges are geared toward increasing mechanical skills as well as communication skills. Both are required on jobs such as those affecting Appellants' containers.

[9]The Appellants claimed that the containers were (never unloaded) in the taxing jurisdiction in their Reply to Motion to Dismiss or Affirm. But the Agreed Statement indicates that they were stopped for loading and unloading, and that the average time in the jurisdiction is three weeks (App. p. 31).

C. Conclusion.

The Appellants have referred to facts which are not on the record, have assumed additional facts, and made totally unwarranted conclusions.[10]

The Appellants' efforts to overcome the Agreed Statement they signed lie at the foundation of many of their arguments throughout their brief. Throughout they fail to realize the logical connection between services which have been rendered by the state and their property's continued safety and usefulness. Thus, the usual test of "benefits and protections"[11] cannot by mere fiat, be restricted to only some "protections".

The claims of the Appellants break themselves down into those which apply equally to interstate and foreign commerce, and those which apply because of an assumed preference in favor of foreign owners or commerce. The new material and issues apply to their arguments concerning both interstate and foreign commerce. The effect of these new submissions on the jurisdictional question has already been discussed.

As to the merits, the "interstate foreign commerce" questions arise from (1) the Appellants' assumption that their property does not benefit from local schools, flood control, landward police and fire protection, local roads, public health and the like, and (2) the Appellants' assumption that the property tax should be subject to the same tests as a user fee. These two assumptions have been discussed previously. It remains to determine the impact of those assumptions on the proper interpretation of the Constitutional provisions relied upon by the Appellants.

---

[10]The Appellees offered to disprove or rebut the Appellants' facts in their Motion to Dismiss or Affirm.

[11]*Wisconsin v. J. C. Penney*, 311 U.S. 435 (1940) at p. 444.

PART ONE.
THE ARGUMENTS AFFECTING COMMERCE GENERALLY.

I.
THE TONNAGE CLAUSE DOES NOT PROHIBIT AD VALOREM TAXES.

The Tonnage Clause, of course, applies whether the vessel taxed is foreign or from the United States. The Appellants assert that a tonnage duty is any *tax* not bearing a relationship to a *specific* benefit and that since the property tax is a general tax (relating to many benefits), it is prohibited (A.B. pp. 35-37). Of course, the logic of this would be to exclude any general tax on any instrumentality by water, even by the state of domicile. The home port doctrine so earnestly advocated by the Appellants would simply become a "no-port" doctrine.

The complete answer to the Appellants' contention is that *The State Tonnage Case*, 79 U.S. 204 (1871) specifically distinguishes a general ad valorem property tax from the tonnage duty concept (79 U.S. at p. 213). The Appellants rely on cases prohibiting fees and charges not having the specific relationship with the specific service. In those cases general taxes used to support government's provision of economic and social stability are not considered.

II.
THE COMMERCE CLAUSE DOES NOT PROHIBIT AD VALOREM TAXES.

The Appellants and their supporting *amici curiae* argue that foreign-owned property ought not to be taxed while domestic property is. This distinction will be taken up later. But the Appellants also assert that

the Commerce Clause prohibits the tax in question because of reasons applying equally to interstate and foreign commerce. They do this in the face of cases uniformly holding, for the last century, that as long as the apportionment is adequate, a State is not prohibited by the Commerce Clause from levying a nondiscriminatory ad valorem property tax on property used in interstate commerce.[12]

A. The Rational Relationship Test Does Not Prohibit General Taxes.

The Appellants rely on *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977); *Ingels v. Morf,* 300 U.S. 290 (1936); *Commonwealth of Massachusetts v. United States,* .... U.S. .... (98 S.Ct. 1153) (1978); *Interstate Transit, Inc. v. Lindsey,* 283 U.S. 183 (1931); and *Sprout v. South Bend,* 277 U.S. 163 (1928) for the proposition that the tax in the case at bar must be related to only fire and police protection, and for the idea that a value-related tax is contrary to the commerce clause. With the exception of *Complete Auto Transit,* the Appellants rely on cases involving *fees.* The general rule regarding taxes is not abrogated by the fee cases since they deal with a charge, which all acknowledge is for a specific purpose and which is imposed upon the user whether he comes into the State for two days or two years.

In that way the privilege tax upheld in *Complete Auto Transit* is similar to the fee. It may be imposed regardless of the duration or amount of the activity

[12]The Appellants argue that certain administrative regulations have the effect of rendering the property "not present" in the United States. These regulations are taken up in connection with the due process clause and the assumption that foreign enterprises are to have preference over domestic ones.

being taxed. Although in that case the privilege tax was measured by gross receipts (also see *Dept. of Revenue v. Association of Washington Stevedoring Companies, supra*), the tax was imposed on a privilege and might just as well have been a flat fee. It is no wonder that the court reviewed the relationship between the privilege tax and the benefits conferred.

The property tax, based upon the value of property continuously or regularly in the jurisdiction and apportioned so as not to fall on a use outside the jurisdiction, rests on an entirely different basis. It is not imposed, and cannot be imposed on property having only a temporary presence. The continuity of the presence and its duration must be substantial, creating by themselves the assurance that the property is receiving benefits of a more general sort than those reimbursed by fee. The taxing of the property itself on the basis of its presence provides assurance that the owner (or user) is receiving benefits from the jurisdiction. Restricting the tax to that allocable to the actual presence in the jurisdiction assures that the State imposes the tax on the basis of property benefiting from its services. (See *Illinois Cent. R.R. Co. v. Decatur, supra.*) That is why a piecemeal investigation of the benefits and the payment is not required when general taxes such as this are levied (see *Illinois Cent., supra; Kelly v. Pittsburgh,* 104 U.S. 78 (1881)).

The privilege tax requires the reasonable relationship investigation for the further reason that its basis is the privilege of doing business in the State. Without some assurance that the taxpayer is, indeed, relying on the State's services (as concluded by the Mississippi Supreme Court in *Complete Auto,* 430 U.S. 277),

the privilege tax runs the danger of being a fee on the basis of no state activity whatsoever. The apportioned tax on property having a continuous presence in the jurisdiction does not run this risk because that presence is sufficient to insure that the State's provision of physical, economic and social stability will benefit the property so taxed. Thus, the State runs no danger of imposing a levy on the mere fact that an enterprise is interstate in character and, in turn, taxing a privilege granted by Congress. The prevention of such a charge is, of course, the very reason for the negative impact of the Commerce Clause (See *Leloup v. Port of Mobile, supra*). Of course, if the "privilege" tax is geared toward other in-state factors, it does not have that effect (*Complete Auto Transit v. Brady, supra*).

B. The Complete Auto Transit Test Validates This Tax.

Despite the argument made above, it may be appropriate to consider the effect which the reasonable relationship test would have on such a general tax as this (see *Clark, supra*). The Appellants have produced a tax bill for one company for one of the three years involved in this action. They rely on this bill for the proposition that they pay for education, flood control, water supply, mosquito abatement, and County and City services generally. They engage in the assumption, already pointed out, that none of these services has anything to do with them or their property. They go further and claim, apparently, that because the tax does not go entirely to fire and police protection, it is contrary to the Commerce Clause. Of course, if one is to engage in the reasonable relationship test, one must review the services provided. The support

which all of the services in question provide to the Appellants' property has been pointed out. To allow the State to tax only for those purposes approved of by the Appellants is to simply ignore the universally held rule that government may render services whether all of the recipients want them or not. (See *Kelly v. Pittsburgh, supra.*)

From the arguments pressed upon this Court by the Appellants and their supporting *amici*, one would conclude that a user fee imposed upon them for fire protection would not meet any objection. The fee, of course, would be valid under the test provided in *Massachusetts v. United States, supra,* at p. 1165, unless the total amount collected greatly exceeded expenditures. One would also believe that expenditures for supporting such items as capital improvements, vehicle maintenance, and purchasing, would not be improper.[13] Although the Appellants appear to assume the contrary, a fee for flood control services would also be supported by a benefit to them. The Los Angeles basin is subject to substantial flood dangers.[14] Such dangers pose a threat to the very routes which the containers travel as well as the harbor area to which the waters are guided during heavy storms. It is difficult to conceive of any reason why such a

[13]The Appellants appear to deny the ability of such a fee to support any part of the service not directly benefiting them. But it cannot be doubted that without long-range and support expenditures, the quality of the "direct" portion of the service will deteriorate. Without public health, for instance, the police force will be less able to protect the Appellants' property.

[14]See Bigger, "Flood Control in Metropolitan Los Angeles, Berkeley, Univ. of California Press, 1959 (Lib. Cong. No. A59-9465) pp. 1-10, 110-111.

state of affairs would not support some levy. The other services provided show the same sort of support, both direct and indirect.

Of course, attempting to levy a fee for each of the services provided by local government would vastly increase the already large bureaucratic army while not assuring any increase in the service rendered. For that reason it is logical to support the imposition of general levies on persons and property having a continuous existence in the jurisdiction. The amount of actual benefit derived from one service may be greater or less depending upon the use to which the property is put, but the benefit, although indirect in some instances, is nevertheless present (See *Kelly v. Pittsburgh, supra,* at pp. 81-82).

Movable property is no less benefited than real property; this is especially true where, as in this case, the property is utilized in a profit-making enterprise. In fact, the frequent movement generates more dependency on a fuller variety of services than the property would if it were stationary. This includes, of course, highways to which the Appellants do not contribute by means of the in lieu motor vehicle registration (See Cal. Revenue and Taxation Code §10758).[15]

[15]The Appellants argue in essence that their contribution to highways is made through the carrier who operates a tractor with a chassis without the trailer into which goods can be placed. The fee levied upon the tractor and the chassis, the Appellants urge, is sufficient. That argument ignores the fact that the motor vehicle fee is in lieu of property taxes and that it is imposed on the basis of 2% of value (Cal. Rev. & Tax. Code §10752.1). The carrier does not have to pay the portion of the fee represented by the trailer's value, because the trailer in this case is the cargo van. Thus, the Appellants appear to be arguing that they are entitled to a total exemption from supporting road costs to the extent of the differences between a truck with a trailer and one without. (Assuming the cargo shipping container is roughly the equivalent of that difference in value, the Appellants are asserting that the 3.4% tax on them is void while at the same time enjoying an exemption from a 2% road tax. As a result of Proposition 13 (Cal. Const. Art. XIII A), the tax on cargo containers, like all property, will be 1% of market value, reducing this property tax to ½ the motor vehicle fee rate.

That movement actually increases reliance upon a skilled workforce to safely take these containers from one place to another and to repair the damage that does occur.[16]

C. Ad Valorem Taxes to Support Local Services Are Logically Related to the Appellants' Property.

Finally, the Appellants urge that they are not benefited in relationship to value. This assumption has been partially addressed. The schools and public health functions of the localities help maintain a skilled workforce. That workforce moves the containers from ship to shore and while on shore, moves them throughout the jurisdiction, repairs them, and directly supports the importers which deal in the goods they carry. The value of the containers to the Appellants is the amount of income they are capable of generating. The localities provide support necessary to utilize the containers safely and efficiently. Unemployment supports the retention of the workforce in the area in difficult times. To the extent that the workforce (or the fire or police force) is less skilled in both communication and mechanical skills, the value will be reduced because the Appellants' cost of moving the containers will increase. If the Appellants chose to do business in a country or a region without such a workforce they would be obliged to give their workers there

[16]The Appellants have repair facilities in the taxing jurisdiction (App. p. 31). At least one of them has a business office in California (see ....).

more training or to import their own workforce. Since the localities undertake these efforts, the income-generating value of the containers is maintained. (See generally *The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus,* 154 U.S. 439, 445, 446 (1894).)

III.

THE DUE PROCESS CLAUSE DOES NOT PROHIBIT AN AD VALOREM TAX ON AN APPORTIONED BASIS.

The Appellants attempt to relitigate *Pullman's Palace Car Co. v. Pennsylvania, supra,* asserting that a federal customs regulation and a California tax regulation stand for the proposition that the property, although present throughout the tax year was, in fact, not "legally" present. They further argue that due process requires a reasonable relationship between the tax and the extent of activity in the jurisdiction (A.B. pp. 48-49). They then assume that this means that the connection be between the tax and the *government's* activity supporting the taxpayer.

The situs requirement in connection with the due process clause is discussed in *Pullman's Palace Car Co. v. Pennsylvania, supra,* at p. 27; *Ott v. Mississippi Barge Lines,* 336 U.S. 169 (1949) at p. 174; *Western Union Telegraph Co. v. Massachusetts,* 125 U.S. 530 (1888) and *Marye v. Baltimore & Ohio R. Co.,* 127 U.S. 117, 123-124 (1888) and needs no further discussion here. But the Appellants maintain that there is an exception to the due process rules discussed there when a state or federal regulatory agency has determined that no situs exists.

Of course, the regulations relied upon by the Appellants show no such thing. The California Supreme Court has construed 18 Cal. Adm. Code Section 205 so as to include the presence of rotated property (*Sea-Land Services Inc. v. County of Alameda,* 12 Cal. 3d 772, at pp. 777-778, 117 Cal. Rptr. 448, 528 P. 2d 56 (1974)) and that interpretation is binding for the purposes of the Court's review (*Saltonstall v. Saltonstall,* 276 U.S. 260, 270 (1928)). Even if it were not binding, only the California Legislature has the authority under California law to make exemptions from the general rule of the taxability of personal property in the state (Cal. Const. Article XIII, Section 2) so that the Appellants' effort to create an exemption on the basis of the administrative regulation is improper.

Equally misplaced is the Appellants' reliance upon 19 CFR Section 10.41a(a)(1). The Appellants assume that the "release (into the country) without entry . . ." means that the vans are simply not present. Of course, "entry" in customs usage means compliance with customs regulations such as submitting the proper documents to the customs office and not physical entry in the borders of the United States (*Harrison v. Vose,* 50 U.S. 312 (1850); 19 CFR Sec. 141.68). It would be peculiar indeed if the validity under the due process clause should depend upon whether the Customs Bureau requires certain formalities to be completed or not. If 19 CFR 10.41a(a)(1) is claimed by the Appellants to be a declaration by the Customs Bureau of whether an article is physically in the country or not, its

effect is covered by discussion of the foreign preference assumption, *infra.*[17]

The Appellants further assert that since the localities impose a harbor fee and motor vehicle registration, they cannot, as a matter of due process, impose a general levy to support other services. Again, they rely on the assumption that their property does not benefit from those services. Of course, *Pullman's Palace Car Co. v. Pennsylvania, supra,* and *Ott v. Mississippi Barge Lines, supra,* both reject this reasoning. Even if *Wisconsin v. J. C. Penney, supra,* did require some due process benefit analysis, it could not possibly stand for the proposition that a tax made in addition to other levies is per se unconstitutional because such an additional tax was validated by that case. In addition, the Court specifically stated that,

> "Had Wisconsin, as part of its price for the privileges it afforded foreign corporations within its borders, explicitly provided for a supplementary tax on the Wisconsin earnings of such corporations, ... The power of Wisconsin to do so would hardly be questioned." (311 U.S. at pp. 442-443.)

Both *Wisconsin v. J. C. Penney, supra,* and *General Motors Corp. v. District of Columbia,* 380 U.S. 553 (1965), are relied upon by Appellants as requiring some piecemeal investigation of the tax and the benefits over and above that required of general taxes under

[17]One other novel argument raised by Appellants is that Cal. Const. Art XIII, Sec. 4 of 1932 exempts their property because the containers are simply part of the ships exempted. The multiplicity of uses of the containers hardly puts them on the same footing as ship's equipment. In any case, the Constitution exempted vessels registered in-the-state, not out-of-state vessels, as the Appellants claim.

the Commerce Clause. But the Court has not utilized the due process clause in this way (*Moorman Manufacturing Co. v. Bair,* .... U.S. ...., 98 S.Ct. 2340 (1978) at page 2359).

The due process clause requires the specificity of benefits normally required of a general tax and achieves that end by requiring proper apportionment. It requires that the tax be tailored to the extent of the activity in the state so that there is assurance that the taxpayer is receiving, in return, the opportunities, protections and the benefits of "an orderly, civilized society." (*Wisconsin v. J. C. Penney, supra,* at p. 444). A property tax apportioned to the amount of presence continuously or regularly in the State achieves those ends (*Ott v. Mississippi Barge Lines, supra,* at p. 174).

PART TWO.
THE FOREIGN-DOMESTIC DICHOTOMY.

I.
INTRODUCTION.

A. The Appellants' Contentions.

The general rules regarding the tests applicable to taxes affecting interstate and foreign commerce have been set forth. The general rule regarding the application of these tests to foreign commerce and interstate commerce alike has been stated by this Court:

> "It is equally well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction." (*Pullman's Palace Car Co. v. Penna., supra,* at p. 23.) (See also *Sea-Land Services Inc. v. County of Alameda, supra,* at pp. 781-784).

In keeping with this rule, property of foreign corporations doing interstate business has been held taxable (*Maine v. Grand Trunk Ry. Co. of Canada,* 142 U.S. 217 (1891), where the tax was on gross receipts in place of all other taxes, and apportioned); and a tax on income of a foreign corporation doing international business, apportioned on the basis of, *inter alia,* personal property (while its personal property was exempted) was also upheld (*Bass, Ratcliff & Gretton, Ltd. v. Tax Comm.,* 266 U.S. 271 (1924)). Finally a tax on a United States business transporting goods in foreign commerce has been upheld (*Dept. of Revenue v. Association of Washington Stevedoring Cos., supra*) (see also *Western Union Tel. Co. v. Taggart,* 163 U.S. 1 (1896)).

Nevertheless, the Appellants seek to avoid the general rule because they are foreign companies whose business in this country is transporting goods in foreign commerce. They do this even though an income tax may be imposed upon them and even though they are accorded treatment on an equal basis with United States residents (Treaty between Japan & the United States to Prevent Double Taxation 23 U.S.T. 1775, Arts. VII, VIII (5)).

The Appellants suggest a variety of reasons to support their claim that they should receive better treatment than their countrymen doing other sorts of business (or doing it without containers) and better treatment than United States businesses.

The Appellants and their supporting amici curiae suggest that a nondiscriminatory tax[18] should instead be altered so as to become a regulation favoring foreign enterprises or commerce. Although they make this contention on the basis of several constitutional, treaty, and administrative provisions, the avenues they pursue can be broken down into three principal arguments.

First, the Appellants and amici contend, foreign commerce is constitutionally not subject to any general taxes by the states because the federal government has a keen interest in its regulation. This approach is nothing more than applying *Freeman v. Hewit,* 329 U.S. 249 (1946) to foreign commerce. They state that *Washington Stevedoring* involves a company whose activities are carried on in only one State and thereby is not eligible for their broad exemption.

---

[18]The "all government" approach to discrimination will be taken up in connection with the commerce clause discussion, *infra.*

Second, there exists a "custom of international law" which is so pervasive that it overcomes the usual requirement for national treatment or equality. That international rule is imposed upon the nations of the world as a result of its being

> ". . . in accordance with a constant and uniform usage. . . ." (*Columbia v. Peru,* 1950 I.C.J. Rep. 266, at 276).

This universal rule is variously interpreted by the Appellants and their supporting amici curiae so as to benefit some foreign owners or not, depending upon how the rule is stated.

Third, the Appellants and their supporters state, Congress itself has changed this nondiscriminatory property tax into a federal regulation, so that foreign enterprises in general, or those engaging in commerce in particular, are not subject to the same taxes as the rest of the people and businesses coming into the taxing jurisdiction and doing business there.

B. The Constitutional Framework of State Action.

At the root of much of the Appellants' discussion is the fundamental assumption that the Constitution does not leave any real sovereignty in the States. Although their powers to regulate commerce may have been severely restricted in the last century because of expanding Congressional activity in the field, the federal system in this country involves the assignment of powers to the different governments (See Wheare,

"Federal Government" 3d Ed. 1953 Oxford, pp. 1-34). Thus logically, the States' authority in exacting the powers left exclusively to them, is not subject to dispute from any quarter.[19]

Of course, the Constitution gives the power to regulate commerce to Congress, and like the bankruptcy and militia powers, the States were entitled to operate in those areas only until Congress exercised the same power so as to displace them (*Sturges v. Crownshield,* 17 U.S. 122 (1819); *Houston v. Moore,* 18 U.S. 1 (1820); *Colley v. Board of Port Wardens,* 54 U.S. 299 (1854)) makes this rule explicit. Cooley specifically states that the power of taxation is able to be held by the states and the federal government at the same time, and refers to Federalist Papers No. 32. The uniformity in foreign commerce required by that case is the uniformity of regulation (pp. 318-319). It is clear that federal permission and encouragement to undertake interstate and foreign commerce do not deprive the States of the right to tax property in the taxing jurisdiction (*Western Union Telegraph Co v. Taggart, supra*), even if the company has a foreign home office (*Maine v. Grand Trunk Ry. of Canada, supra; Canadian Pacific R. Co. v. King*

[19]That is not to say that State powers can be exerted so as to regulate commerce (*Boston Stock Exchange v. New York Tax Comm.,* 429 U.S. 318 (1977)), or to deny any person equality under the law or due process (U.S. Const. 14th Amend.). It means that once having exerted their power so as not to do that which is within Congress' power, and so as not to violate the Constitution, the States' power ". . . is not bound to yield." (Justice Taney's opinion in *The License Cases, supra,* pp. 581-582).

Co., (Wash. 1916), 155 Pac. 416, or if the property comes from abroad (*Michelin Tire Corp. v. Wages, supra*).[20]

But the Appellants and their supporting *amici curiae* assume that a uniform nonregulatory tax is a regulation of commerce and is therefore subject to alteration by the central government. As pointed out previously, this is not true as long as the States operate within their powers, of course. In *Gibbons v. Ogden, supra,* Chief Justice Marshall was faced with this very question. He defined regulation as the prescription of rules by which commerce may be conducted (22 U.S. at p. 196) but at the same time clearly distinguished between taxation and regulation (22 U.S. at pp. 202-203) (also see *The License Cases, supra*).

The division of powers concept has been supported repeatedly by this Court (see *Texas v. White,* 74 U.S. 700, 725 (1869)).

It is also logical. If the central government were to order California to create an exemption for foreign goods or enterprises in such a way that a foreign rope dealer operating in California would be benefited, for instance, one would believe that the central government intended to benefit some American interest. That is the claim made here, *i.e.*, that the United States requires this exemption power to receive reciprocal benefits for American enterprises. In the example cited,

[20]The *amicus curiae* brief on behalf of the foreign airlines asserts that they all expected exemptions and therefore were entitled to them on a constitutional basis. The only reliance anyone could reasonably have in the home port doctrine's application to property having a constant presence was that encouraged by *Scandinavian Airlines System, Inc. v. County of Los Angeles,* 56 Cal.2d 11, 14 Cal.Rptr. 25, 363 P.2d 25 (1963), *cert. den.* 368 U.S. 899.

the American interest may be a Southern string manufacturing industry. But to ask the people and businesses operating in California to be the only support for the benefit ultimately received by Southern employees is not logical. The support for national interests should come from the national treasury rather than from alteration of policies belonging to some of the States. In that way the national taxpayers, all of us, help support the national interest. We do this on a uniform basis rather than on the basis of the amount and kind of State taxes imposed which will vary from State to State.

The Federal Government has both the resources and the flexibility to engage in the day-to-day shifts required to conduct foreign policy. To actually impose some broad-brush exemption on the States in favor of some part of foreign commerce will defeat the product-by-product changes which the executive department is empowered to make (see the Tariff Act of 1974, 19 U.S.C. §§2102 and 2253) and which in fact it has made, *e.g.*, against "CB" radios (see, Wall Street Journal of March 29, 1978).

At the same time a nondiscriminatory tax levied consistently on interstate and foreign commerce alike, and in proportion to the extent of taxpayer activity in the state,

> ". . . can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce . . . . By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importa-

> tion in a manner inconsistent with federal regulation." (*Michelin Tire Corp. v. Wages, supra,* at p. 286.)

This Court thus disposed of the argument that increasing the cost of foreign commerce nullified a State tax automatically.

But that *Michelin* quotation goes even further in shedding light on what the Appellants seek to accomplish. They wish to impose a rule on the States which will automatically ". . . encourage . . . importation in a manner inconsistent with (prior) federal regulation." (*Michelin Tire Corp. v. Wages, supra,* at p. 286.) As previously pointed out, a surcharge has been imposed on imported "CB" radios in order to counter threats to domestic production. The Appellants seek to reduce the tax cost of importing such articles to a point below that imposed upon interstate shipments of the same products by the same means.

By its very nature, the foreign preference argument cuts against the ability of the federal government to regulate commerce if accepted as a Constitutional mandate. The foreign preference argument, if accepted as a power of Congress, allows the Federal Government to måke exemptions from the States' tax base *without being responsible to the people for the carrying out of the States' responsibilities.* The invitation for abuse inherent in such a system is obvious. The "superior" legislature's members would be under pressure to cut the States' tax base while the "inferior" legislatures would be responsible to their constituents for any reduction in service. No federal system will survive with such encouragement.

It now remains to consider the application of the foreign preference argument on the Constitutional, treaty, and regulatory provision relied on by the Appellants.

II.

THE CONSTITUTION ITSELF DOES NOT MANDATE A PREFERENCE FOR FOREIGN ENTERPRISES DOING BUSINESS IN A STATE.

The Appellants and their supporting *amici curiae* postulate as a constitutional, and therefore invariable, rule, an exemption for these cargo shipping containers. They suggest that foreign commerce is more "untouchable" than interstate commerce and must be granted an exemption, not from user fees, but from general taxes. It is difficult to discern whether this claim is made for all enterprises engaging in foreign commerce or those whose place of incorporation is in another country. Also unanswered is the question of whether the rule changes if a container lessor is domestic while the lessee is foreign. (This facet is covered in some depth in the brief of the Multi-State Tax Commission.) In any case, say the Appellants, the States may not tax their property (or that operated by them).

Whether utilizing the import-export clause or the commerce clause, the Appellants and their supporting *amici curiae* assert that the federal activity in foreign commerce would be nullified by this tax. But they make these claims in the face of *Michelin Tire Corp.*

v. Wages, supra; Dept. of Revenue v. Washington, etc. Stevedoring Cos., supra; Bass, Ratcliff & Gretton Ltd. v. Tax Comm., supra; Maine v. Grand Trunk Ry. Co. of Canada, supra; and *Clyde Mallory Lines v. Alabama,* 296 U.S. 261 (1935). It is difficult to see how the taxes and fees in those cases would impair the federal government's operation any less than the tax in this case.

The Appellants distinguish *Michelin* and *Washington Stevedoring* on the ground that the actual person or property taxed is no longer foreign, but to allow one company to avoid taxation because it is foreign, even though it does the same thing is not logical. (What if Japan Lines had no containers but performed its own stevedoring operation here?) It is also countered by *Bass, Ratcliff.* There is no magic constitutional immunity because an entity is foreign. Nor is there one for a foreign company conducting operations as a carrier. But, claim the Appellants, there is one in favor of foreign carriers in foreign commerce. The distinction is hard to see. It is harder still when one considers that these carriers are not immune from fees. (*Clyde Mallory Lines v. Alabama, supra.*)

The Constitution does not make the awkward distinctions the Appellants and their supporting *amici* propose.[21]

---

[21]The carriers and the United States emphasize a "blackmail" approach to constitutional interpretation, alleging that many countries will impose an apportioned property tax on U.S.-owned containers. But this approach can be used to nullify this Court's decisions involving the taxability of any foreign company (*Clyde Mallory Lines, supra; Bass, Ratcliff, supra*) or even foreign goods (*Michelin Tire Corp. v. Wages, supra*). For all those taxes and fees involve the possibility of some reciprocal treatment abroad.

A. The Import-Export Clause Does Not Require a Preference for Foreign Owned Property, or That Engaged in Foreign Commerce.

The Appellants assert that because containers (although used as part of a truck or train), are part of a ship, they should be immune from taxation because taxing a ship restrains the ability of the Federal Government to conduct foreign policy, disrupts interstate harmony, and interferes with the free flow of goods (A.B. pp. 38-40). (These are the policies to be served by the Import-Export clause.)

The prohibition of the import-export clause applies to imposts and duties on imports. It is proper to review what imposts and duties are. This Court said,

> "Our independent study persuades us that a nondiscriminatory ad valorem property tax is not the type of state exaction which the framers of the Constitution or the Court in Brown had in mind as being an 'impost' or 'duty' . . . ." (*Michelin Tire Corp. v. Wages, supra,* at p. 283.)

Impost and duties are levies discriminating against imported goods as such (see Crosky, "Politics and the Constitution in the History of the United States," Chicago U. Press (1953) pp. 295-323). There is no reason to regard the nondiscriminatory tax, apportioned in such a way so as to tax only instate activity, as discriminating against importers (*Michelin, supra,* at p. 286).

Thus, such a tax does not run contrary to any Import-Export Clause policy:

(1) The Federal Government can easily make adjustments in national taxes so as to favor one import over another. Reducing the tax on goods

travelling by only one means inhibits that process;

(2) The harmony between the states of this country is obviously not disturbed by a tax which is apportioned so as to reflect only in-state activity. (See *Pullman's Palace Car Co. v. Pennsylvania, supra; Michelin Tire Corp. v. Wages, supra;* and *Dept. of Rev. v. Assoc. of Wash. Stevedoring Cos., supra*);

(3) A tax which increases the cost of goods does not, on that account, become an interference with foreign commerce (*Michelin, supra,* p. 286; and *Washington Stevedoring, supra,* p. 1398), nor does a tax whose proceeds are used to educate the workforce and police force, or to prevent floods.

Thus, the uniform, apportioned tax on property in the jurisdiction is not an impost or a duty simply because it is imposed upon a corporation whose office is located in a different country.

But the Appellants further assert that the Import-Export Clause is violated because the tax constitutes a transit fee. In essence, they argue that any general tax, is such a fee. Alternatively, they suggest that a tax on goods in transit is prohibited (A.B. pp. 40-43).

Of course, much of the discussion is based upon the assumption that any general tax is not related to governmental services. This assumption has already been addressed in this brief. The claim that this is a tax on goods is directly refuted by *Canton R.R. Co. v. Rogan,* 340 U.S. 511, 514-515 (1951); and *Department of Revenue v. Assoc. of Washington Stevedoring Co., supra,* at p. 1402.[22] The idea that an apportioned tax on instrumentalities of commerce is a tax on property in transit rests on the idea that the continuous presence theory is not valid. But as this Court said in *Pullman's Palace Car Co. v. Pennsylvania, supra,* at p. 23:

> "It is equally well settled that there is *nothing* in the Constitution or law of the United States which prevents a state from taxing personal property, employed in interstate *or foreign* commerce, like other personal property within its jurisdiction (*Delaware Railroad Tax,* 18 Wall 206, 232; *Telegraph Co. v. Texas,* 105 U.S. 460, 464; *Ferry Co. v. Pennsylvania,* 114 U.S. 196, 206; *Telegraph Co. v. Attorney General,* 125 U.S. 530, 549; Marye v. Railroad Co., 127 U.S. 117, 124; *LeLoup v. Mobile,* 127 U.S. 640, 649)." (Emphasis added.)

The reliance of the Appellants on fee cases in order to support their contentions regarding user fees has also been discussed.[23]

---

[22]Appellants assert that this property tax is the same as the taxes imposed in *Thames & MM Ins. Co. v. U.S.,* 237 U.S. 19 (1915) and *Fairbank v. U.S.,* 181 U.S. 283 (1901) (A.B. p. 42 fn. 11). Both those cases were distinguished from a general tax on the transporting company in *Canton R.R. Co. v. Rogan, supra,* p. 514. In addition, the federal prohibition in those cases is against any "tax" on exports (Art. I, Section 9, Clause 5), not just on "imposts" and "duties" (Art. I, Section 10, Clause 2).

[23]They rely on *Keokuk Packet Co. v. Keokuk,* 95 U.S. 80 (1876); *Massachusetts v. United States, supra; Ray v. Atlantic Richfield Co.,* .... U.S. ...., 98 S.Ct. 988 (1978); *Bob-Lo Excursion Co. v. Michigan,* 333 U.S. 28 (1948); and similar cases involving regulations of commerce. Of course, these cases deal with both interstate and foreign commerce.

(This footnote is continued on next page)

The Appellants and their supporting *amici curiae* argue that the Commerce Clause requires that the States not oblige a shipping business in foreign commerce to pay any general tax. Of course, their argument must be restricted to foreign-owned businesses, since there is nothing prohibiting a general tax on United States' companies, *Dept. of Revenue v. Assoc. of Washington Stevedoring Cos., supra*). They rely, first, on the idea that this country's courts cannot control other countries' taxing authorities. Therefore, argue the Appellants, the courts must, as a Constitutional principle, tailor a state's taxes to another country's in order to avoid double taxation (A.B. p. 47). (The actuality of this threat is taken up, *supra*). Next, they suggest that since most countries appear not to impose property taxes on containers belonging to foreign countries, the United States should constitutionally prohibit any taxation of any foreign container (A.B. pp.

If applied so as to defeat general taxes, as the Appellants suggest, they would void the taxes approved in *Pullman's Palace Car Co. v. Pennsylvania, supra, Western Union Tel. Co. v. Taggart, supra;* as well as *Canadian Pacific Ry. Co. v. King County, supra,* and *Sea-Land Services, Inc. v. County of Alameda, supra.*

The Appellants also utilize *Pittston Stevedoring Corp. v. Dellaventura*, 544 F. 2d 35, 53 (2d Cir. 1976) and *Leathers Best Inc. v. S.S. Mormaclynx*, 451 F. 2d 800, 815 (2d Cir. 1971) involving maritime insurance and tort rules for the idea that, no matter how used, the containers are part of a ship. Of course, specific ships are not cited because the whole fleet of ships can carry containers. But the containers fit trucks and trains, too (App. pp. 31-32). Thus, the Appellants appear to be saying that the containers being a part of ships is either dependent upon some "pre-emption" that parts of ships have over being a part of anything else, or upon the idea that they are part of a ship most of the time, and are therefore nothing else. Neither possibility is supported by law, or logic. The cases cited obviously do not consider the changing purposes of the containers when taxed here. (*See Sea-Land Services Inc. v. County of Alameda, supra,* at p. 789.)

47-48).[24] Finally, the Appellants (A.B. p. 26) and the Solicitor General suggest that foreign commerce is subject to no taxation or only home port taxation.

The automatic reduction of the States' taxes in order to prevent double taxation solely on the basis of what another country does or does not do seems to be a ponderous rule indeed. It was developed in *Scandinavian Airlines System Inc. v. County of Los Angeles, supra* and rejected in *Sea-Land Services Inc. v. County of Alameda, supra.* (See Clark, *supra,* 4 Pepperdine L.R. footnotes 71, 74, 84 and 100 for a critique of this sort of analysis.) It is also rejected by the idea that foreign law should not automatically prescribe special rules for the treatment of foreigners in this country (see *Republica v. DeLongchamps,* 1 U.S. 111 (1784). Finally, it runs contrary to *Bass, Ratcliff & Gretton Ltd. v. Tax Comm., supra.* To immunize foreign property as a Constitutional matter because foreign countries immunize United States property is to ignore other taxes imposed by that foreign country and would actually encourage foreign countries not

---

[24]It is interesting that there is no representation by the Appellants or the Secretary of State or any other amicus, that other countries actually follow the home port doctrine by imposing a full ad valorem tax on their ships or containers while pursuing a policy of not taxing foreign containers at all. This aspect of the case is taken up in conjunction with the claim that there is some custom of international law prohibiting the tax in question. It need only be pointed out here that the State Department's letter is exceedingly vague and incomplete. The apparent difficulty in getting the information is reason enough to avoid depending upon what other countries tax and how they tax it. Omitted entirely from any of the considerations put forward by Appellants and their supporters, for instance, is whether other taxes imposed upon U.S. carriers, such as treaty-approved income taxes, go to support the sort of services the Appellants describe as not affecting their property.

to impose property taxes and to use other means for collecting revenue from United States enterprises, so as to benefit their own business.

The commerce clause argument concerning "discrimination" depends for its validity upon the idea that discrimination in the international field is somehow different than in the interstate context and must be restricted to specific property taxes. The idea is that discrimination means that if the international practice is not uniform, the United States must adjust. One assumes that no objection would be made to imposing property taxes on those containers remaining in the taxing jurisdiction over 30 days (see U.S.B. p. 15a), or perhaps on any Afghanistani property in the jurisdiction at all.

In reality, of course, a finding of discrimination does not depend upon what other countries do. The general rule of *Pullman's Palace Car Co. v. Pennsylvania, supra,* is not that property in interstate or foreign commerce may be taxed in the same way as property in another country, but

> ". . . like other personal property within its jurisdiction." (*Supra,* at p. 23).

So, the discrimination prohibited by the commerce clause is not that which adjusts treatment of Virginia's businessmen in France against France's businessmen in California. The discrimination prohibited is the uneven treatment of some or all foreigners by a State's government. The States have *no* authority to regulate foreign commerce so as to *favor or disfavor* it, but

they have the right to tax it (*Michelin Tire Corp. v. Wages, supra; Boston Stock Exchange v. New York State Tax Comm., supra*).[25]

The Appellants rely, for a contrary rule, on *Moorman Manufacturing Co. v. Blair, supra* and particularly the dissent therein (A.B. p. 47). The difficulty in that case was not that a tax was imposed, but that the method of determining the tax base was not the most accurate. The Appellants have not stated, at any point in these proceedings, that California's apportionment method inaccurately described the presence of the property in the jurisdiction. The ability of Iowa to tax on a properly apportioned base was not in dispute in *Moorman*. The Appellants here make the argument that other jurisdictions' ability to tax prevents *any* taxation at all.

Finally, the Appellants and their supporting *amici* seek to carve out of the general rules, a domain of non-taxability of foreign commerce by the States. Insofar as they rely on the simple fact of a tax's being prohibited because it may increase the price of goods or because it taxes commerce regulated by the Federal Government, their arguments are refuted by *Michelin Tire Corp. v. Wages, supra,* at p. 286; *Pullman's Palace Car Co. v. Pennsylvania, supra,* at p. 23; *Leloup v.*

[25]It is true that taxes can be used in such a way as to be regulatory in their effect (see *Sinnot v. Davenport,* 63 U.S. 227 (1859) and *Hines v. Davidowitz,* 312 U.S. 52 (1951)). But, with the exception of the Appellants' argument to the effect that a foreign country's tax changes a U.S. tax into a regulation because the foreign tax would be unconstitutional in the U.S., that question is not presented here.

Mobile, supra at 649; *Clyde Mallory Lines v. Alabama, supra; Washington Stevedoring, supra;* and *Bass, Ratcliff & Gretton Ltd. v. Tax Comm., supra.* As already pointed out, a Constitutional prohibition which actually causes a preference for foreign goods works against federal regulations rather than for them. The Federal Government can do its regulatory job best against a background of nondiscriminatory state taxation. The Appellants' reliance upon *Gibbons v. Ogden, supra,* is misplaced. Chief Justice Marshall specifically distinguished between the States' power to regulate in the absence of federal regulation and the States' power to tax property in its jurisdiction, which is ". . . sacred . . ." (*Brown v. Maryland,* 25 U.S. (12 Wheat.) at p. 448) and ". . . most absolute and unqualified . . ." (Federalist Papers No. 32) (See *Gibbons v. Ogden,* 22 U.S. at pp. 197-200). Thus, the grant of the power to regulate does not, as the Appellants suggest, prohibit State general taxation of foreign commerce (see *Pullman's Palace Car Co. v. Pennsylvania, supra,* at p. 23, quoted above).[26]

[26]The Appellants appear to rely on *Brown v. Maryland, supra; Philadelphia & Southern Mail SS Co. v. Pennsylvania,* 122 U.S. 326 (1887); *Philadelphia & Reading R. Co. v. Pennsylvania,* 82 U.S. (15 Wall.) 232 (1873); *Bowman v. Chicago & N. Ry. Co.,* 125 U.S. 465 (1888) and *Chy Lung v. Freeman,* 92 U.S. 275, 179 (1875) (A.B. p. 27); *Brown v. Maryland's* commerce clause discussion deals with importers being subjected to taxes on a discriminatory basis. *Philadelphia & Reading R. Co. v. Pennsylvania* involves a gross receipts tax on all of the receipts of an interstate carrier allowed in 1873, seventeen years before *Pullman's Palace Car Co. v. Pennsylvania, supra.* The Court separated the States' taxation of foreign commerce as opposed to interstate commerce on the basis of the *Import-Export Clause,* not on the power of Congress to regulate commerce as the Appellants suppose. The requirements of the *Import-Export Clause* have been discussed, *supra. Bowman v. Chicago & Northwest RR Co.,* 125 U.S. 465 refers to certain opinions in *The License Cases, supra.* Its general conclusions regarding those opinions (125 U.S. at

The Appellants' arguments regarding the home port doctrine seeks to distinguish foreign commerce from interstate commerce (A.B. pp. 23-25). But the arguments merely force the old situs rule into the mold which renders these containers immune. Regardless of the Constitutional provision relied upon by the Appellants—they cite none—the distinction is not foreign commerce but the continuity of the presence.

> "Ships or vessels, indeed, engaged in *interstate or foreign* commerce upon the high seas *or other waters* which are a common highway [and there-

pp. 479-480) do not mention a different degree of State activity in foreign as opposed to interstate commerce. In fact, the Court states, quoting from the *State Freight Tax case,* 82 U.S. 232:

> "The (commerce clause) power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations." (125 U.S. at p. 480).

Also see 125 U.S. at pp. 482, 485-486; *Chy Lung v. Freeman,* 92 U.S. 275 (1876) invalidates a discriminatory statute on the basis of the embarrassment caused to the general government. It discusses the power to regulate foreign commerce, but does not compare it to the power over interstate commerce. But the most important thing about these cases is that they do not deal with state taxation. As said in *Philadelphia & Reading R. Co. v. Pennsylvania, supra,* at p. 293:

> "We think it may safely be asserted that the states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent may be essential to the healthy existence of the state governments, and the Federal Constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence."

The Court goes on to define the time that a tax becomes prohibited, *i.e.,* when it becomes *regulatory.*

Finally, the Appellants describe *Ott v. Mississippi Barge Lines,* 336 U.S. 169 (1949) as "careful not to abrogate the validity of the 'Home Port' rule in the case of instrumentalities used exclusively in foreign commerce." Any reading of the case shows that it was "ocean carriage" which was not ruled upon by the Court.

fore not a domain of state taxation], and having their home port, at which they are registered under the laws of the United States at the domicile of their owners, in one state, are not subject to taxation in another state at whose ports they *incidentally and temporarily* touch for the purpose of delivering or receiving passengers or freight. *But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction,* and therefore can be taxed only at their legal situs—their home port and the domicile of their owners. [Citing cases upon which Appellants rely]." (*Pullman's Palace Car Co. v. Pennsylvania, supra,* at p. 23) (Emphasis added).

Thus the high seas are not a place where the states can exercise their jurisdiction but having been on the high seas does not imbue property with some mysterious tax-proof clothing. If it is otherwise taxable, water transportation property is not immune because of its activity.

Of course, these containers are made for land transportation, and not only create the continuous presence required, but also take advantage of local and state services throughout the taxing jurisdiction. (See *Sea-Land Services Inc. v. County of Alameda, supra,* at 775 and 789.)

III.

THERE IS NO CUSTOM OF INTERNATIONAL LAW REQUIRING THAT CONTAINERS BE IMMUNE FROM ANY PROPERTY TAXES.

The Appellants and their supporting *amici curiae* suggest that the home port doctrine is of such pervasive use that the cargo containers in question simply may not be taxed (A.B. pp. 24-27, 28 *et seq.*). In order to oblige a nation or its subdivisions to conform to such a rule, it is necessary that there be a rule binding upon the nations. The Appellants and their supporting *amici* do not rely upon the actual use of the home port concept by foreign countries. They assert only that some countries do not impose property taxes on foreign cargo containers some of the time.

Even assuming that failure to impose a property tax on foreign containers means that the country in question is imposing a full tax on its own nation's containers, the usage alleged by the Appellants and their supporters must show a custom of international law.

> "The law [referring to customary maritime rules of the sea] is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities." (*Sears v. The Scotia,* 81 U.S. (14 Wall.) 170, 187 (1872).)

Again, assuming that non-taxation of U.S. containers means a home port rule, the Appellants do not show any such consistency. (The Solicitor General does not explain whether Afghanistan imposes a full value or an apportioned basis, but it does impose a property tax on foreign containers.) Most importantly, according

to Appellants at least one of our major trading partners (Germany) will impose a property tax on containers remaining in the taxing jurisdiction over 30 days. *Thus some of the containers taxed here would be taxed there,* possibly on a full value basis.

On the contrary, there is a rule of international law which is accepted even by the United States Department of State: national treatment. Andreas Roth in his "International Law Applied to Aliens" (1949) describes this rule and reflects upon the rule of foreign preference urged on this Court by the Appellants and their supporting *amici curiae.*

> "The doctrine of 'national treatment' or equality doctrine sums up the rules of treatment of aliens by saying that the international obligations of the State [*i.e.,* nation] are discharged from the moment that it has put the alien on a footing of complete equality in everything pertaining to civil or private rights. This theory starts from the major postulate that the aliens must accept the legal conditions which he finds in the country of residence, and that neither he nor his government can justifiably complain if he is accorded, like nationals, the benefit or application of these conditions." (p. 62).

> "To admit that the alien may have more rights than the national of the State, when he enjoys hospitality, *would be an insult to the nationals.* . . . [I]f an alien could demand indemnities for damages created by a legislative disposition, then the State would no longer be sovereign in its territory and its power and free will would in the end be subject to a foreign authority.

> "The 'national treatment' seems therefore to be in the eyes of many authors, the *only* principle which could guide the relations between the State and the alien in the spirit of positive international law. Not only can the alien have no more rights than the national, but even equality with the national is considered to be the maximum of treatment the alien can expect and to be likely to remain an idealistic postulate." (pp. 64-65).

The United States has rather consistently followed this practice (Roth, *supra,* at p. 64; Hakworth Digest of International Law Vol. II, pp. 56-57) and has specifically told U.S. citizens residing abroad not to expect anything better. (See letter from the Second Assistant Secretary of State to August Gross, June 29, 1921, Hakworth, *supra,* Vol. III, p. 575.) In dealing with a tax on capital stock (the same as in *Pullman's Palace Car Co. v. Pennsylvania, supra*) our own State Department has told American citizens:

> "As a general rule, it may be stated that nations possess the exclusive right of imposing taxes upon property situated within their territories and of determining the purpose to which the revenues derived from such taxes shall be devoted. If, therefore, the taxes to which you refer are general and uniform in the operation, and make no discrimination against the property of American citizens, it would not ordinarily be within the province of this Government to make any representations in regard thereto." (Hakworth, *supra,* p. 576).

The Appellants' claim of an international rule of reciprocity is not supported by the facts and logically it derogates from the power of the United States govern-

ment.[27] Any general levy relating to this property would be prohibited, not just to the States, but to the central government itself.

IV.

TREATIES CANNOT AND DO NOT VOID NONDISCRIMINATORY STATE TAXATION OF PROPERTY CONSTANTLY IN THE TAXING JURISDICTION.

A. Introduction — Congress May Not Expand Its Powers Over the States by Treaty.

Much that has been said regarding Congress' ability to make a nonregulatory State tax into a federal regulation applies at this point. The Appellants appear to rely on *Missouri v. Holland*, 252 U.S. 416 for the proposition that treaties by their own force add powers to Congress not otherwise there. (A.B. p. 28.) But the case involves the *regulation* of foreign affairs,

[27]The cases cited by Appellants actually support this Court's application of national treatment. Contrary to Appellants suggestion, *Jordan v. Tashiro*, 278 U.S. 123 applies the rule of *equality* and reciprocity, not the automatic reciprocity which takes away national sovereignty as urged by the Appellants. *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1829); *Hauenstein v. Lynham*, 100 U.S. 483 (1880); and *Nielson v. Johnson*, 279 U.S. 47 (1929) show the development of rules of equal treatment, not superior treatment. (It is acknowledged that Congress has prescribed and can prescribe equality and thereby restrain the States from regulating both commerce and foreign affairs).

Both the constitutional and the international custom arguments rest on the automatic grant of reciprocity based upon the act of foreign nations. To see how that automatic grant will operate to deprive a government of its sovereignty, one has only to review *Zschering v. Miller*, 389 U.S. 429 (1968). In that case, the Court refused to allow the State of Oregon to regulate rights in foreign countries on the basis of those countries' political liberties. It seems inappropriate to allow another country to dictate the rights its citizens may claim on the basis of nothing more than the foreign country's usage of a particular tax system.

not the taxation of goods by a State, and supports the federal authority to conduct such regulation *with its own resources*, not the States'. The birds in that case were not seen as the particular property of the State. Taxing property within the State is a sovereign power of the State government (*Lane County v. Oregon, supra*, 76-78; *Union Pacific R.R. Co. v. Peniston, supra*, 29-30 (1873) and other cases cited *supra*). The authority of the States to govern property within their jurisdiction is not made less than their rights under the Constitution simply because a treaty is involved. (*Mayor, etc. of New Orleans v. United States*, 35 U.S. 662, 736 (1836)). The general rule was stated by this Court in *Holden v. Joy*, 84 U.S. 211, 242-243, and *Holmes v. Jennison*, 39 U.S. 540, 569 (1840) (per Taney C.J.):

> "[The treaty power] was designed to include all those subjects which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions *and the distribution of powers between the general and State governments.*" (Emphasis added).[28]

[28]Even the language of the General Agreement on Tariffs and Trade, 61 Stat. (5), (6), TIAS 1700 (hereinafter GATT), acknowledges that the general governments of the parties may not have complete authority over local governments. Part III, Article XXIV, par. 6, states:

> "Each contracting party shall take such reasonable measures as may be available to it to assure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory."

B. The Containers Are Not Immune From Taxation Because the Customs Bureau Receives a Bond to Assure That They Will Not Be Marketed.

Both the Appellants and the Solicitor General suggest that the act of placing property in bond immunizes it from taxation because the lack of duties was meant to encourage the use of cargo containers and taxing them in the same way that entire trucks or railroad cars are taxed would discourage their use. In light of all that has been said about the power of the Federal Government to make a regulation out of State taxes, and the cases holding that the Central Government cannot destroy the States' taxing power, the contention does not appear to be supported.

It should be emphasized that the complete Federal power proposal leaves the States in the position of providing services while unable to collect taxes to support them. The position of the United States would simply allow for the gradual destruction of the States' tax bases while in no way reducing their responsibility to all businesses, both foreign and domestic.

The Solicitor General relies on *People v. Compagnie Generale Transatlantique*, 107 U.S. 59 (1883); and *McGoldrick v. Gulf Oil Co.*, 309 U.S. 414 (1940) (U.S.B. pp. 25-27). Further reliance is placed on the "custom of nations" allowing any general taxes. In turn the existence of this custom of nations is shown, according to the United States, by *Hays v. Pacific Mail SS Co.*, 58 U.S. 546 (1855), and *Keokuk Packet Co. v. Keokuk, supra*. Finally, reliance is placed upon

Parkersburg & Ohio River Transportation Co. v. Parkersburg, 107 U.S. 691, 696 (1883) for the proposition that fees do not run afoul of the Federal Government's regulatory purposes, while general taxes do. (U.S.B. p. 23, fn. 12).

It should be noted that the Container Convention was amended in 1972 so as to omit the bonding requirement. (This is taken up in the Multi-State Tax Commission's Brief.) Subsequent discussion here assumes that no such amendment was made.

(1) A Nondiscriminatory, Apportioned Tax Does Not Cancel Out the Ability of the Federal Government to Regulate by Means of Its Tariff System.

People v. Compagnie Generale Transatlantique, supra, presents the classic case of the state's imposing a fee on aliens. The regulatory character of the levy is clearly recognized by the Court (107 U.S. p. 60), and because it is discriminatory, it can be used to actually thwart the Federal Government's ability to conduct foreign affairs, and levy duties. According to the opinion, the state did not refute this, but attempted to characterize the tax as an inspection fee. The impropriety of such discriminatory levies is not contested by the Appellees. They constitute a regulation because of their discriminatory character.

McGoldrick v. Gulf Oil Co., supra, involved a new sales tax imposed within two years after duties were lifted on imported oil. The amounts were approximately the same. The Court, as pointed out by the United States, focused on this benefit meant to enhance American oil companies' competitive ability and its reduction by the imposition of the sales tax.

The Court did not inquire into the ability of the Federal Government to make exceptions to uniform state taxes. That issue was apparently not presented

to the Court (see summary of arguments 84 L. Ed. 840, *et seq.*). As a result *McGoldrick v. Gulf Oil* does not stand for the existence of the power so explicitly rejected in *Union Pacific R.R. Co. v. Peniston, supra,* and the other cases holding the States' authority to tax inviolate (see also Fed. Papers No. 32). If the Court had come to grips with these prior statements, it might have explored other avenues of regulating commerce than by reducing the States' taxes without reducing their responsibility.

One of the strongest points the *McGoldrick* Court makes is that during the oil's manufacture in New York, it was physically separated from domestic products. Under the rationale of *Low v. Austin, supra* and before *Youngstown Sheet & Tube Co. v. Bowers,* 358 U.S. 534 (1959), the goods would be immune from a uniform state tax under the original package doctrine *until it was ready for sale.* The Court was aware of this fact (309 U.S. at p. 423). But the product was destined for immediate export and so was never really "commingled" with the mass of property in the taxing jurisdiction. For that reason, and because of the Customs Bureau's control of the goods throughout their import-manufacturing-export process, the customs regulations were adequately describing what was believed to be the then-present state of the law regarding the non-taxability of the goods in question (see 309 U.S. at 425-426).

But *Michelin Tire Corp. v. Wages, supra,* would recognize, at least in the case of property taxation, that the States' benefits may be billed to the property taking advantage of them whether it is from a foreign country or from the United States. *Michelin* renders the logic of *McGoldrick* inappropriate. This is especially true in light of the fact that the New York tax took advantage of what was no more than a narrow "window" of tax liability under the old law (after manufacture but before being sent to the ship).

It was quite logical, under the *Low v. Austin* test as then developed, that goods always physically separated from domestic products and never used in the taxing jurisdiction should receive a temporary immunity until they were actually aboard ship. That test never considered the character of the state tax, but simply excluded it as long as the goods were never "commingled with the mass of property" in the taxing jurisdiction.

That rule, and the basis for its application to imports which are later exported, are no longer valid. The recognition of the fact that the States benefit imports by protecting them, by maintaining a good work force to manufacture or move them, and the like, brings with it a recognition that the view of the sacred character of foreign products is no longer proper. Once the role of the States in providing protections, benefits, and opportunities is seen as applying to foreign as well as domestic goods on the same basis, then the fiction that the States must never tax foreign commerce disappears along with the *Freeman v. Hewit* attitude toward interstate commerce.

One should also be aware of factors which make the facts before this Court materially different from those in *McGoldrick*. Perhaps the most important is the lack of segregation and the lack of constant customs supervision. The bond in this case is a constant one, applying to any containers happening to be in the United States. The cargo containers in the United States are free to go anywhere their business takes

them. They may go to any place in Los Angeles County where they will be kept from fire hazard by the County Fire Department. They can be moved by a skilled driver who is on the job because the public health officials see that there is no epidemic. No customs official controls the movement of the containers, or protects them from fire, or provides flood protection, or builds roads. No customs official will respond to a burglary call. *Michelin* recognizes these factors while *McGoldrick,* operating under *Low v. Austin* did not have to consider them. Thus, *McGoldrick* does not answer the rules of *Union Pacific v. Peniston,* or *Michelin Tire Corp. v. Wages* (nor does it apply when the Customs Bureau is not maintaining the foreign property at a special place devoted to its needs).

(2) The Tariff System and the Cancellation of Duties on Containers Was Not Meant to Provide Any Competitive Advantage.[20]

Finally, the competitive advantage reduced by the coincidental application of the tax in *McGoldrick,* is not present here. There is no history of a need to protect American companies' positions in the Container Convention. The only purpose it has is to prevent

[20]Although the foreign air carriers appear to assume that U.S. domestic carriers are not taxed, obviously that is incorrect (*Braniff Airways v. Nebraska Board,* 347 U.S. 590 (1954)). Despite their argument that some detrimental reliance has occurred, the treaty and regulatory provisions applicable to air carriers are not materially different than those applicable to containers. The brief of the Air Transport Association focuses on the international "hue" acquired by this property and the fact that airplane companies pay airport fees. That does not take away from the fact that they also rely on the locality's work force, its flood control, and its public health efforts. Those efforts, as well as general police and fire protection for the areas where the airplanes stop, all support the ability of the airlines to sell tickets in the locality and to service its passengers.

customs duties from being imposed because the containers are not to be sold here. As said by Senator Lausche while introducing the Container Convention at the same time as other agreements adjusting duties,

> "The fourth convention—the Customs Convention on Containers—Executive J, 89th Congress, second session—provides for duty-free temporary entry of those big containers, like lift vans and movable tanks, which are being used increasingly in international trade. . . ." (Cong. Record—Senate 1st Session 90th Cong. p. 4937.)

Unlike *McGoldrick v. Gulf Oil Co., supra,* the United States Brief does not cite any history of attempts to achieve any competitive advantage by means of the Container Convention, only to avoid *duties.* The imposition or non-imposition of duties on property has as little to do with uniform property taxation as tariffs do with the uniform taxes in *Michelin.*

(3) The Tariff System as Postulated Does Not Logically Apply to State Property Taxes Alone.

The United States attempts to restrict the application of its "In Bond Doctrine" to State level property taxes. Because of the inadequate factual information regarding the uses to which foreign fees are put, the State Department fails to show any substantial difference between taxes and fees. If airport fees in Japan go to support schools it would be no different than a general levy supporting schools.

Going beyond the State Department's "facts," the United States claims that fees used for particular services do not frustrate the federal scheme or the "custom of nations" while taxes used to support more than

one service do (U.S.B. p. 15, fn. 7, p. 23, fn. 12). Logically, a fire protection fee in the amount of the sales tax in *McGoldrick* would have been just as counter-productive as the tax was. It was not the uses to which the revenue was put that mattered to the *McGoldrick* court, but the *amount* of the levy (see *Epstein v. Lordi*, 261 F.Supp. 921 (1966) (aff'd 389 U.S. 29) at p. 940). Logically, there is no distinction between a State fee and a State tax in *McGoldrick*.

Reliance is placed upon *Parkersburg Transportation Co.; Keokuk Packet Co.* and *Hays*. As previously pointed out, *Keokuk Packet* deals with the difference between fees and duties. *Hays* merely says that a jurisdiction without situs may make sanitary regulations while not able to tax. *Parkersburg & Ohio River Transportation Co.* contrasts fees with tonnage duties, which even the United States admits this tax is not. (U.S.B. p. 30, fn. 23). So none of these cases show the distinction the United States seeks to make.[30] The Appellants' "In Bond Doctrine" is not logical.

The primary difficulty with the United States' position is that it seeks to press upon the States the automatic duty to impose fees rather than multi-purpose taxes, or in the alternative to automatically increase the "encouragement" afforded containers and other property. It should be emphasized that this additional exemption is afforded *only* if the containers are in foreign commerce. The containers of Sea-Land Services, Inc. going from Hawaii to California would, under the "In Bond Doctrine," be obliged to pay taxes. They are not given

[30]The United States is assuming, like the Appellants, that there is no benefit accorded to the property by landward protection, or skilled and available police, fire and work forces.

any benefit by the Federal customs regulations. Other obvious difficulties present themselves. The "encouragement" automatically added by a State tax exemption will vary from state to state depending upon the State's taxing system and the level of services it provides. It will also vary depending upon the willingness of a State to shift from a general tax to a fee system. In addition, there is no logical reason why the determination of the Federal Government's "perceived need for nationwide uniformity" does not also apply to tariffs, causing the States to automatically adjust their taxes so as to add to the "encouragement" given by a low tariff on a certain product. The possibilities, when one also considers the activities of the Interstate Commerce Commission, are endless.

A uniform State tax does not cancel a competitive advantage, as this Court stated in *Michelin*. It allows the Federal Government to give precisely the encouragement it wants. The fluctuations of competition are best met by the Federal Government and are most easily achieved by adjusting one schedule which is national in scope. To call upon the States to shift their taxes and their fees from all the people and property enjoying its services to only a few, and then shifting them back again, depending upon the perceptions of Congress, the Customs Bureau, or the ICC is both contrary to the federal system and foolhardy.

Equally impractical and unfair is the cancelling of a California property tax in order that a business operating out of Virginia may receive a benefit abroad.

The "In Bond Doctrine" is a poor and complicated substitute for the federal system, and is rejected by *Michelin's* view of a nondiscriminatory tax's effect on

federal regulations (see *Clark, supra*). Congress may prevent the States from regulating foreign commerce (see *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324 (1964) and *Dept. of Alcoholic Bev. Control v. Ammex Warehouse*, 224 F.Supp. 546 (1963)) but may not turn a State tax into a regulation.

There is no evidence that it ever intended to do so.

C. This Country's Friendship, Commerce and Navigation Treaties, and GATT Do Not Create a Regulation From a Nondiscriminatory Tax.

The Appellants rely on Articles XI(1), 4, and XXII (2) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 UST 2063, TIAS 2863 (hereinafter FCN Treaty with Japan) for the proposition that the federal government intended to adjust the normal rule of national treatment by putting in its place a rule of automatic reciprocity.[31]

FCN Art. XI(1) calls for national treatment. The requirement of that paragraph calls for uniformity between nationals and aliens ". . . within the territories of such other party . . . ."[32] Thus, the treaty establishes the general rule of national treatment, as the Solicitor General points out (U.S.B. p. 23, fn. 13). In addition, the FCN treaties prohibit one country from taxing the nationals of another country on any larger basis than that apportioned to the first country's territory.

[31]The dangers of loss of internal governmental control by the creation of such a rule have already been described. The Solicitor General, quite naturally, seeks to avoid the automatic reciprocity rule when it could cut into the ability of the Central Government to levy taxes (see U.S.B. fn. 13).

[32]This language does not appear in the Appellants' version (compare A.B. p. 4a with the FCN Treaty itself).

Of course, without apportionment it is likely that Country A could tax all of the income of a national of Country B and not run afoul of the rule of national treatment. All national taxes have been the subject of apportionment principles by treaty for some time (see 52 Minn. L.R. 1261).

It is at this point that the Appellants assert that, assuming Japan taxes its own containers on a full ad valorem basis (or at all), the United States is pre-empted from any property tax. But the terms of the treaty do not prohibit a total of more than one full tax. They prohibit the non-resident country from imposing more than an apportioned tax. The treaty is silent as to the rights of a country regarding its own nationals.

Finally, the Appellants turn to the Federal and State regulations cited above for the proposition that failure to comply with Federal regulations on entry means that the cargo containers do not provide any presence to apportion, and that a State regulation interpreted by the California Supreme Court not to prohibit taxing containers, does in fact prohibit them. These arguments have already been discussed, and the character of "entry" for customs purposes has been pointed out, but it is worth noting that nothing in the FCN treaty calls for reliance upon such fictions in order to arrive at a proper apportionment.

Thus the FCN treaties do not provide the automatic reciprocity the Appellants urge. In fact in the one reference in the FCN treaty dealing with the States and localities, the Japanese nationals are accorded the same treatment as U.S. nationals from other states (FCN Treaty Article XXII(4)).

The Appellants next assert that the tax is prohibited by GATT's requirement that taxes not be imposed "so as to afford protection to domestic production." The Appellants do not appear to have any disagreement with the tax's complying with Article III, par. 2. But assert that, combined with the assumption of full ad valorem taxes on cargo containers, the California tax is applied "so as to afford protection to domestic production." Of course, the "reciprocal interpretation" invites nations to utilize home-port-type taxes of every sort in order to prevent taxation abroad and is thus logically without foundation. But, in addition, one of the interpretive notes to Article III, par. 2, is instructive. Paragraph 2 requires national treatment, but also (in a portion left unquoted by the Appellants) requires additional compliance with paragraph 1. The interpretive note in Annex I, "ad Article III," par. 2, states that a national treatment tax will not violate paragraph 1 unless particular competing products are taxed differently. The intention not to consider the "reciprocal interpretation" is clear from this note.

D. The Statutes Relating to Tonnage Duties and the Container Convention Do Not Seek to Prohibit Uniformly Applied State Taxes.

The Appellants rely on 46 U.S.C. Secs. 121, 128, 135, 141, 142, and 146 for the proposition that they prescribe a reciprocal exemption from property taxes. Of course, those sections deal with tonnage duties and discriminatory duties. Property taxes are not included (*State Tonnage Tax Cases, supra*).

The Appellants and the Solicitor General assume that the Container Convention can make a federal regulation out of a State tax. The principal thrust of the United States' position has been discussed. The Solicitor General invites this Court to avoid this inquiry and to simply determine that the Federal Government has done "something" to containers and has thereby impliedly declared that the States may not tax them. But if the Federal Government has dealt only with import taxes, *i.e.*, duties, the effect is nothing more than a tariff or a lack thereof. The imposition, or non-imposition, of tariffs without more, does not mean that the States may not levy nondiscriminatory taxes on imported goods because such taxes do not impede Federal regulations (*Michelin Tire Corp. v. Wages, supra*, at p. 286). The idea that foreign commerce has a constitutionally protected "tax-free zone" has also been discussed.

The Appellants appear to contend that a nondiscriminatory property tax falls within the ambit of the Convention itself because it is a tax imposed "by reason of importation" (Customs Convention on Containers, 20 UST 301, TIAS 6634, Chap. I, Art. I(a)). Logically, this theory would call for prohibiting all taxes and fees. As the United States Brief states in connection with the Import-Export Clause:

> ". . . it is difficult to contend that the California tax levied on the general mass of property within the state, is a tax 'directed at imports or commercial activity as such.'" (U.S.B. p. 31, fn. 23).

Of course, the Appellants' logic is rejected by *Michelin Tire Corp. v. Wages, supra*. In addition, there is no showing that Congress intended to give container shippers any competitive advantage over conventional ones.[33]

V.
THE APPELLANTS' THREAT OF DOUBLE TAXATION IS ILLOGICAL.

Whether grounded on the Constitution or the automatic reciprocity concept, the Appellants and their supporting *amici* urge this Court to rely on the possibility of double taxation. They urge this Court to adopt the home port doctrine for foreign-owned instrumentalities of commerce. The use of that doctrine would mean that a country would be able to fully tax containers to which it may give *no* benefits (if the instrumentality of commerce was never present there) (see *Southern Pacific v. Kentucky*, 222 U.S. 63 (1911) where the Court held that the lack of benefits did not matter).

But even the imposition of the home port concept by the Court will not stop Afghanistan from taxing the containers going there, nor will it stop the countries utilizing the 30 day-6 months rules (or any other time limit) for the containers that stay longer (in this case possibly up to six months, App. p. 31).

This Court does not have the authority to bind all countries to the home-port system any more than it has the authority to bind the countries to a system

[33]In fact 19 CFR §10.41(a) and §123 deal with other forms of transportation without requiring the security of a bond. Thus, Canadian "CB" radios, although travelling in foreign commerce would not, under the United States' arguments, receive the same treatment as Japanese, thus triggering the most-favored-nation provisions of our treaties.

of apportionment, and in all probability no system, no matter how much it favors shippers, will be adopted by all countries. The Appellants and their supporting *amici* have not cited one country that applies a full ad valorem tax on its containers while exempting all foreign ones. Even if they could, there is no control that the Court can exert that would force all of the countries to follow suit.

The double taxation threat is no less if the home port doctrine is established. One would assume that New York could then impose a full tax on Sea-Land's containers in foreign commerce, but that still does not cancel Germany's 30-day rule or Afghanistan's taxes.

Most importantly, the double taxation threat is premised on the assumption that other countries utilize the same overall tax systems that we do. It assumes that the central governments of other countries do not support local services by means of taxes and fees which are imposed on U.S. carriers. The "competitive advantage" portion of the threat argument assumes that rates in other countries are the same as ours. These assumptions are simply not supported. Even if they were today, they could change tomorrow. Blindly guaranteeing a certain kind of shipper that it will be subsidized by the people of this country is an "insult" to the people of this country (Roth, *supra*). They deserve better.

The best that this Court and this country can do is to provide even-handed tax treatment for enterprises similarly situated. The best we can do is to see that Japanese containers and Canadian railroad cars are given the same services and the same benefits as our

own. The best that we can do is to see that they pay their share for those benefits, as our containers, railroad cars, and airplanes do, so that the goods they carry will reflect the full cost of delivery. Both the shippers and other businesses deserve this equality of treatment.

No more, and no less.

Conclusion.

The nineteenth century cases upon which Appellants and their supporting *amici curiae* rely do not reject the idea of apportionment of property utilized in both foreign and interstate commerce. It is only when taxes are imposed on the basis of property having no situs in the nondomiciliary jurisdiction, or when the tax is not apportioned (as in the *State Freight Tax Case, supra*) that the Court has disallowed state taxes. As long as either full situs or an apportioned presence is involved, the Courts have validated a tax on such property.

The Appellants and their supporting *amici curiae* fundamentally base their arguments on the possibility that the international community will shift from not taxing U.S. owned instrumentalities to taxing them on the basis of their actual presence in the taxing jurisdiction. No fairer or more accurate rule can be imagined.

The Appellants assert that U.S. container companies will suffer because they have more presence abroad than at home. In light of the reduction in California's property tax to 1% (see Cal. Const. Arts. XIIIA and XIII §2), the actual money difference will not be substantial (the Sea-Land Brief assumes that foreign taxes will be in amounts similar to California's). In

any case, foreign carriers will be taxed in this country as well.

Canadian railroad cars are taxed in this country (see *Canadian Pacific Ry. Co. v. King County, supra*) and have been for some time. It is difficult to say that one sort of instrumentality should be treated differently than any other.

Equal taxation by the States will allow the Federal Government to accurately pinpoint and solve problems of competitive advantage in keeping with national needs and still allow the States to derive support for the services they provide from all the property in the jurisdiction.

To do anything else, to freeze a foreign preference into the Constitution or to establish an "In Bond Doctrine" is to shut off Federal flexibility and to require a substantial shift in State tax burdens on to U.S. businesses and residents. Taxation is, to many businessmen, a thing to be fought wherever encountered. But to do so on the basis proposed by the Appellants is shortsighted and will engraft onto the Federal system an automatic preference for foreign goods and enterprises having no benefit for the people of this country.

Respectfully submitted,

John H. Larson,
County Counsel,
James Dexter Clark,
Deputy County Counsel,
Counsel for Appellees.

Staff Assistants:
Mary Mayer,
Greason Haworth,
Lawrence S. Rubinson,
Linda Van Winkle.

Service of the within and receipt of a copy thereof is hereby admitted this .... day of October, A.D. 1978.